Supreme Court, U.S.
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No. 01-1229

In The

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

BRIEF IN OPPOSITION

SALVADOR A. MUNGIA
WSBA #14807
Counsel of Record
DARRELL L. COCHRAN
WSBA #22851
J. BRADLEY BUCKHALTER
WSBA #29295
1201 Pacific Avenue
Suite 2200
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

3619

QUESTIONS PRESENTED

23 U.S.C. § 409 prohibits the discovery or admission in state courts of information "compiled or collected [by a state governmental entity] for the purpose" of obtaining federal funding for improved road safety. On interlocutory appeal, the Washington Supreme Court, while leaving intact the validity of § 409, ruled that a 1995 amendment unconstitutionally expanded the scope of the Act to include traffic accident data collected by state officials pursuant to Washington law and unrelated to federal funding. The court remanded the matter, directing the trial court to apply the enunciated standards to resolve the parties' discovery dispute. Pierce County now asks this Court to grant certiorari to hear this interlocutory appeal.

Has Pierce County shown compelling reasons why this Court should accept certiorari where:

- The appeal is interlocutory, involving pretrial discovery disputes;

- Only three state courts of last resort have ruled on the scope of the 1995 amendment and none considered, much less decided, the issue addressed by the Washington Supreme Court;

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BRIEF IN OPPOSITION

Respondents Ignacio Guillen and Mariano Guillen respectfully request this Court to deny the petition for writ of certiorari seeking review of the opinion of the Washington Supreme Court.

RESPONDENTS' COUNTER STATEMENT

In July 1996 Clementina Guillen was killed at an intersection in Pierce County, Washington.

Ignacio Guillen subsequently requested that Pierce County produce documents pursuant to the Washington Public Disclosure Act regarding prior accidents at the intersection. Guillen limited the documents he sought: "I want to make the record clear we are not seeking any reports that were specifically written for developing any safety construction improvement project at the intersection at issue." Pet., App. H at 4-5. Pierce County denied Guillen's requests, claiming the documents were privileged under 23 U.S.C. § 409.

Guillen subsequently sued Pierce County under Washington's Public Disclosure Act.[1] The trial court ordered Pierce County to produce (1) accident records prepared by the Washington State Patrol, (2) two collision diagrams, (3) police traffic collision reports and motor vehicle reports, and (4) a letter between county

[1] After the filing of the lawsuit, Pierce County disclosed all but five of the requested twenty documents.

employees. Pet., App. A at 9-10. The County appealed this ruling to Washington's intermediate appellate court.

While the appeal of the public disclosure action was pending, Guillen sued Pierce County for the death of his wife, Clementina, alleging that the County had been negligent by not providing a four-way controlled traffic device at this dangerous intersection. In the negligence lawsuit, Guillen propounded discovery to Pierce County seeking, among other items, information that could not possibly come within the scope of § 409:

> (1) the identity of Pierce County deputy sheriffs who had patrolled the intersection during the six years preceding Ms. Guillen's death;
>
> (2) the identity of all County employees, agents, or officials with knowledge of accidents at the intersection;
>
> (3) the identity of persons involved in accidents at the intersection.

Pierce County refused to comply with the discovery request, claiming privilege under 23 U.S.C. § 409. Guillen moved for an order compelling discovery. The trial court granted the order. Pierce County sought interlocutory review by the intermediate appellate court. The court granted review and consolidated the two appeals.

The court of appeals affirmed the trial court, holding that the requested documents were not exempt from discovery. In the court's opinion:

> [t]o apply Section 409 properly, a court must distinguish between (a) the agency (e.g., a law enforcement agency) that collects or compiles information for purposes *unrelated* to Section 152 and (b) the agency (e.g., a public works department or road department) that collects and compiles information *pursuant* to Section 152. Section 409 does not protect reports or data collected by the former, because the former was not acting pursuant to Section 152. Section 409 does protect reports or data collected by the latter, *provided* that the latter was acting "for the purpose of identifying, evaluating, or planning the safety enhancement of . . . hazardous roadway conditions . . . pursuant to" Section 152.

Pet., App. H at 18-19 (emphasis in original).[2]

The court of appeals rejected Pierce County's argument that "once the road department 'collects' reports 'pursuant to' Section 152, the public may no longer have access to them *in any form*." Pet., App. H at 20 (emphasis in original). According to the court, "[t]his argument contravenes the plain meaning of Section 409," "would extend Section 409 far beyond its purpose [of] neutraliz[ing] the litigation-aiding effect, if any, of Section 152 activity," and "would give the County carte blanche to render immune from discovery every accident report related to a public road within its territory, simply by

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[2] Section 152 of the Act provides, in part:

> Each state shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists, bicycles, and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvements.

having its road department 'collect' the report." Pet., App. H at 20-22.

Pierce County sought and obtained review by the Washington State Supreme Court. After initial briefing, and although neither party had raised the issue, the court requested additional authority on the constitutionality of § 409. Ultimately, the court declined to follow the analysis used by the court of appeals. Instead, the court held that § 409 violated the Tenth Amendment.

The Washington Supreme Court, however, limited its holding to a single aspect of § 409: a 1995 amendment. The Washington Supreme Court:

- did not strike down the Act;
- did not rule that plaintiffs could discover reports written for federal funding;
- did not allow any discovery of data compiled or collected solely for the purpose of obtaining federal funding.

Instead, the court ruled that the federal government did not have the authority to enact a law prohibiting state courts from considering accident reports and data that had been prepared pursuant to state law regardless of federal funding opportunities.

Contrary to the County's framing of the issue, if this Court accepted certiorari, it would not be considering the constitutionality of § 409. A review of the Washington Supreme Court's decision would also not involve a review of the federal government's authority to preclude the introduction of reports and data collected and compiled by the state solely for purposes of obtaining federal

funding. Instead, this interlocutory discovery dispute involves a narrow question: whether the Washington Supreme Court properly interpreted the Act to preclude discovery and admissibility in state court proceedings data collected and compiled under required state law and, if that interpretation is correct, whether the Washington Supreme Court was correct in holding that such an interpretation would violate the Tenth Amendment.

Certiorari is not appropriate for three reasons. First, because this case arose on interlocutory appeal, this Court lacks jurisdiction to grant certiorari. Second, even if the Court has jurisdiction, Pierce County has failed to show why, as a matter of policy, this Court should review this interlocutory decision. Finally, Pierce County has failed to show that the Washington Supreme Court decided an important federal question in a way that conflicts either with the decision of another state court of last resort or with relevant decisions of this Court. Pierce County's petition should be denied.

I. THIS COURT LACKS JURISDICTION TO ACCEPT CERTIORARI.

Because the appeal to the Washington Supreme Court was interlocutory, because no final judgment or decrees have been entered, this Court lacks jurisdiction to grant certiorari.

The Guillen dispute arose on interlocutory appeal from two lawsuits: (1) a public disclosure action and (2) a tort action. Both required Pierce County to produce certain information regarding the intersection where Clementina Guillen was killed. In both actions, the trial courts

ordered Pierce County to produce the requested information. Pierce County, instead of complying with the orders, pursued interlocutory appeals. By obtaining interlocutory review, Pierce County never produced any documents in response to the trial courts' orders. Accordingly, the Washington Supreme Court could not enter a final judgment. Instead, the court remanded the matter to the trial courts to determine which documents fell within its ruling:

> Because the record contains insufficient facts to apply this standard to all of the disputed items, we vacate the lower courts' rulings and remand for supplementation of the record and further proceedings not inconsistent with this opinion.

Pet., App. A at 114.

Congress has limited the power of this Court to review state court judgments to those that are final. 28 U.S.C. § 1257(a). As this Court held in *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 118 S. Ct. 481, 139 L. Ed. 2d 433 (1997),

> [t]his provision establishes a firm final judgment rule. To be reviewable by this Court, a state court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein."

Jefferson, 522 U.S. at 81 (citation omitted). Absent a final judgment, this Court lacks jurisdiction to grant certiorari.

Id. at 80 (stating Court lacked jurisdiction to accept interlocutory review and dismissing writ of certiorari as "improvidently granted").

The decision of the Washington Supreme Court is not final. It does not effectively determine the litigation. It is, instead, an interlocutory decision relating to the intermediate step of discovery. The Washington Supreme Court did not rule which documents must be produced and which ones may be withheld. Instead, it remanded the case to the trial courts for further action consistent with the standards that it enunciated. No final judgment has been entered.

Under its firm final judgment rule, this Court consistently refuses to review interlocutory decisions such as the one here. *See Jefferson*, 522 U.S. at 84. There are four narrow exceptions to this rule, none of which apply here:

> [first,] cases in which there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings is preordained. . . . [Second,] cases . . . in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings. . . . [Third,] those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. . . . [Fourth,] those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking

> review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479-83, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).

This case does not fall within any of the exceptions to the final judgment rule. First, the decision of the Washington Supreme Court does not conclude or preordain the result of the negligence action. Instead, it merely clears the way for further discovery, moving the negligence action toward eventual trial. Moreover, in both the public disclosure suit and the negligence action, the trial courts must conduct evidentiary hearings before actually ing the standards announced by the Washington S Court.

Second, the court's decision will not demand review regardless of the outcome of the negligence action. As noted, all this decision does is to allow the tort action to proceed. The interpretation of § 409 is secondary to the tort action.

Third, Pierce County can obtain review of the Washington Supreme Court's decision after the negligence trial whether it wins or loses. Pierce County, because of the Public Disclosure Act lawsuit, has a basis for appealing

the Washington Supreme Court's ruling once a final judgment, with a clear record on the documents it is being required to produce, is entered.

Fourth, and finally, this is not an action where a decision on the federal question would make the state cause of action irrelevant. Instead, just the opposite is true here: the federal question is secondary to the state cause of action. In other words, any decision by this Court would merely determine the evidence to be admitted in the state proceedings still to come.

Although Pierce County argues in footnote one of its petition that this Court has jurisdiction, the cases upon which it relies do not support its argument. First, this Court has held that *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987), "is an extraordinary case," has "confine[d] it to the precise circumstances the Court there confronted," and has "clarif[ied] that [it] does not augur expansion of the exceptions stated in *Cox Broadcasting Corp.*" *Jefferson*, 522 U.S. at 83-84. As even Pierce County must acknowledge, the circumstances of this case differ greatly from the "precise circumstances" of *Ritchie*: Pierce County's right to obtain review is limited neither by the Double Jeopardy Clause nor respondents' "willingness to appeal." *Ritchie*, 480 U.S. at 48. Second, the Court in *Helstoki v. Meanor*, 442 U.S. 500, 99 S. Ct. 244, 61 L. Ed. 2d 30 (1979), not only dealt with the constitutionally guaranteed Speech or Debate Clause but also based its decision on analogies to the Double Jeopardy Clause. Neither principle applies here.

The Washington Supreme Court faced and decided the validity of an evidentiary privilege on interlocutory

review. It made no final decision allowing Pierce County to invoke the jurisdiction of this Court. Certiorari is inappropriate.

II. EVEN IF JURISDICTION EXISTS, THIS COURT SHOULD NOT ACCEPT REVIEW BECAUSE THIS IS AN INTERLOCUTORY APPEAL.

Even if this Court has jurisdiction to hear this interlocutory appeal, the basic policies underlying interlocutory appeals show that the acceptance of certiorari is not warranted.

This Court has offered numerous policy reasons for denying certiorari in cases on interlocutory appeal. First, the Court avoids piecemeal federal review of state court decisions. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 67, 68 S. Ct. 972, 92 L. Ed. 1212 (1948). "This prerequisite for the exercise of the appellate powers of this Court is especially pertinent when a constitutional barrier is asserted against a State court's decision on matters peculiarly of local concern." *Republic Natural Gas*, 334 U.S. at 67. Second, the Court seeks to avoid giving advisory opinions where there may exist no "case" or "controversy" in the sense of Article III. *See id.* at 67-69; *see also Radio Station WOW v. Johnson*, 326 U.S. 120, 123-24, 65 S. Ct. 1475, 89 L. Ed. 2092 (1945). Finally, because "many issues in a hotly contested litigation either become moot as the litigation progresses, or turn out to have had no effect on the end result," the finality rule helps relieve the burden on this Court. 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 202.03[1] (3d ed. 2001) *citing, Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380,

107 S. Ct. 1177, 94 L. Ed. 2d (1987) (stating that review of issues that may become moot or irrelevant would burden appellate courts).

The policies underlying this Court's reluctance to accept review of interlocutory appeals show why certiorari is inappropriate in this case. The dispute over § 409 represents one discrete issue in a case that has been prematurely halted by Pierce County's interlocutory appeal. Ultimately, the case may give rise to other issues requiring yet another appeal. To avoid a piecemeal appeal and its accompanying delay, this Court should deny certiorari and allow this case to run its course in the Washington courts.

This Court, as do all appellate courts, disfavors interlocutory appeals for very practical reasons. Pierce County has failed to show why, as a matter of policy, it is entitled to interlocutory review by this Court. This Court should deny the petition and allow the case to run its course in Washington courts.

III. CERTIORARI SHOULD NOT BE GRANTED BECAUSE THIS CASE DOES NOT MEET THE REQUIREMENTS OF SUPREME COURT RULE 10.

As this Court has set forth in its rules, "certiorari will be granted only for compelling reasons." SUP. CT. R. 10. Under Rule 10, the Court may consider granting certiorari in state court appeals if:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A. The Washington Supreme Court's decision does not conflict with the decisions of other courts of last resort.

Contrary to Pierce County's assertion that the Washington Supreme Court's decision conflicts with "every" decision of other courts of last resort and of the United States court of appeals, Pet. at 7, an examination of case law demonstrates just the opposite. The Washington Supreme Court has been the only court to consider the 1995 amendment under a Tenth Amendment analysis. Only three other state courts of last resort (Alabama, Alaska, and Louisiana) have considered the 1995 amendment as it relates to public roads.[3] None of those cases performed a constitutional analysis as to whether the federal government had the authority to preclude the use of state gathered information in state court simply because that same data were subsequently used for seeking federal funding.

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[3] *See, e.g., Ex parte Alabama Dep't of Transp.*, 757 So.2d 371 (Ala. 1999); *Walden v. Dep't of Transp., State of Alaska*, 27 P.3d 297 (Alaska 2001); *Reichart v. State*, 694 So.2d 193 (La. 1997).

In *Ex parte Alabama Dep't of Transp.*, 757 So.2d 371 (Ala. 1999), the Alabama Supreme Court did not raise, address, or decide whether the 1995 amendment, if interpreted to preclude the use of raw data in state court proceedings, was constitutional. Instead, it held that although the plaintiff was not entitled to obtain information regarding prior auto accidents from the Alabama Department of Transportation he could obtain the same information from the Department of Public Safety:

> Further, we note that the information sought by Hitchcock – reports of accidents occurring at the site of Hitchock's accident – is under the custody and control of the Alabama Department of Public Safety. Hitchcock is not without a source for the information he alleges he requires in order to be able to proceed with any legal action to recover damages for his injuries.

Id. at 374.

Far from being inconsistent, Alabama reached the same result, albeit in a different manner, than the Washington Supreme Court.

In *Walden v. Dep't of Transp.*, 27 P.3d 297 (Alaska 2001), the Alaska Supreme Court, in dicta,[4] stated that a Department of Transportation Design Study Report was not subject to discovery because of § 409. (Here, Guillen stated that he was not seeking such reports.) The case did not address the 1995 amendment nor did it raise or

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[4] The Alaska Supreme Court did not need to address that issue as the plaintiff's attorney failed to preserve the issue for appeal and, in fact, at trial, explicitly stated that she agreed that the report was inadmissible. *Id.* at 304.

analyze any potential constitutional infirmity regarding the 1995 amendment.

Walden did, however, review an issue regarding the use of prior accidents at the roadway in question. The plaintiff had discovered that there had been nine prior accidents at the section of road at issue. The trial court admitted evidence of two of those accidents. The plaintiff argued that evidence of a third accident should have been admitted. The Alaska Supreme Court upheld the trial court's decision. The Alaska Supreme Court noted the rule in Alaska that evidence of prior accidents is admissible to show notice of a defective or dangerous condition as long as the accident took place under substantially similar circumstances. The court held that the plaintiff failed to provide sufficient evidence that the third accident she sought to have admitted occurred under substantially similar circumstances. *Id.* at 303.

Thus, in Alaska, evidence of prior accidents using traffic accident evidence is admissible. Once again, the result is consistent with the result reached by the Washington Supreme Court.

In *Reichert v. State*, 694 So.2d 193 (La. 1997), the court addressed the issue of whether four documents that contained safety opinions should have been excluded by the trial court. Three letters were from the chief engineer of the Department of Transportation and Development to state representatives regarding the placement of a flashing beacon at the intersection where the accident occurred. The fourth document was a DOTD memorandum recommending against the installation of a flashing beacon. The court neither considered nor ruled upon any

constitutional issue regarding the 1995 amendment. Instead, the court ruled that the letters and memorandum were the types of materials to which § 409 applied and thus should have been excluded.[5]

An examination of the decisions by the courts of last resort that have addressed the 1995 amendment to § 409 as it relates to public roads shows that none of them have considered the constitutionality of the amendment. Moreover, the post-amendment decisions are all consistent with the result reached by the Washington State Supreme Court. Accordingly, for that reason alone, Pierce County has failed to meet its heavy burden of demonstrating why review should be granted under Rule 10(b).

B. The Washington Supreme Court did not decide an important federal question.

Pierce County has not demonstrated that the Washington Supreme Court decided an important federal question. Pierce County spends substantial time in its brief attempting to convince this Court that the Washington Supreme Court reached the wrong result. However, the County never articulated what important federal question the court decided. It is unable to do so because none exists.

An important federal question may have existed if Congress had explicitly stated that it intended § 409 or its

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[5] Once again, Guillen agrees that reports containing conclusions or opinions about safety aspects of an intersection are not discoverable.

1995 amendment to prohibit the discovery and admissibility of all raw data, whether or not collected for purposes of federal funding. However, it did not and consequently there is no important federal question.

This Court consistently holds that if Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985). "This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 448, 461, 100 S. Ct. 2758, 115 L. Ed. 2d 410 (1991). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988).

In enacting or amending § 409, Congress did not state that it intended to place beyond discovery and admissibility information unrelated to federal funding. Instead, as the Washington Court of Appeals correctly understood, Congress distinguished between reports and data related to federal funding activity and reports and data unrelated to federal funding activity. Congress merely intended § 409 to have a neutralizing effect, as it did not wish to transform federal funding activity into a

"virtually no-work tool for direct use in private litigation." *Light v. State*, 560 N.Y.S. 2d 962, 965 (N.Y. Ct. Cl. 1990). Put another way, "Congress did not want any party involved in litigation to be better off, **or for that matter worse off**, by reason of a State's participation in seeking [federal] funding." Pet., App. A at 121 (Madsen, J., concurring) (emphasis added).

Other state courts addressing the 1995 amendment to § 409 as it applies to public roads recognize that raw data unrelated to federal funding is not privileged under § 409. For example, the court in *Irion v. State* held:

> "[t]hese [accident] reports were not collected or compiled by the State for the purpose of obtaining federal funds or to enforce safety. Historically, accident reports have been collected by the Department of Public Safety for many other purposes. Collection or compilation of such reports have far outdated the enactment of 23 USCA 409, although the Department of Transportation and Development may have used such accident reports as raw data or information to compile other reports. That fact, in and of itself, does not make the underlying facts inadmissible simply because they are later recorded by the Department of Transportation and Development. Furthermore, if the court were to adopt the interpretation which the State proposes, then no accident report could ever be admitted in any case, regardless of whether or not the State is a party. Clearly, this is not the intent of the statute. The federal statute must be construed restrictively to prohibit only the information that is expressly stated therein."

Irion, 760 So.2d 1220, 1226 (La. App. 2000).[6]

Although Congress altered the language of § 409 in the 1995 amendment, it did not expand the statute's original scope. Instead, Congress clarified that even raw data, when collected or compiled for the purpose of § 152, was protected. Employing the doctrine of *noscitur a sociis*, Congress intended to protect only data or reports compiled or collected *for the purpose of engaging in activity pursuant to § 152*.

Moreover, Congress reinforced the core purpose of the statute. As Congress stated in its legislative history, "[i]t is intended that raw data collected prior to being made part of any formal or bound report" becomes privileged. Pet., App. A at 55 *citing* H.R. Rep. 104-246 § 328 at 59. Congress did not say *all* raw data, e.g., police records, accident reports, etc., become privileged. Congress only said *collected* raw data become privileged. In doing so, it recognized the significance of "collecting" data. Much as attorney work product is immune from discovery because it reflects the mental impressions of those who generated it, Congress created a privilege for raw data collected for § 152 purposes because the data reflect the mental impressions, specifically the concerns over dangerous roadway conditions, of the government employees collecting it. Such a rule makes perfect sense: mental

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[6] *See also Dep't of Transp. v. The Superior Court of Solano County*, 47 Cal. App. 4th 852, 855 n.2 (Cal. App. 1996) (stating the 1995 amendment to Section 409 "did not eliminate the express requirement that the information at issue have been compiled or collected *pursuant to section 152*" (emphasis in original)).

impressions traditionally enjoy privilege or immunity. Facts do not. Much as the courts hold litigants are entitled to discover raw facts that have not been "processed" by an attorney into work product, Congress left intact a litigant's right to discover raw data that have not been "processed" by a government employee for purposes of § 152. Thus, when raw data are collected for purposes of § 152, they are protected. However, when that same raw data are collected as part of regular state requirements, they are not. What exact distinction was made by the Alabama Supreme Court in *Ex parte Alabama Dep't of Transp.*, 757 So.2d at 371, and the Louisiana Supreme Court in *Irion*, 760 So.2d at 1220, discussed earlier.

The Washington Supreme Court found the 1995 amendment to § 409 unconstitutional because it failed to properly recognize the scope of the Act as did the Alabama Supreme Court. This Court, however, avoids constitutional issues unless the plain statement of Congress requires otherwise. *See Gregory*, 501 U.S. at 461. The plain statement of Congress in the 1995 amendment to § 409 comports with the most basic concepts of discovery and privilege in the American justice system. Congress simply never stated it intended to preclude the use of information that would otherwise be gathered simply because it was later used for an application under § 152. The Washington Supreme Court's factual predicate is incorrect and its constitutional decision unnecessary. For that reason, even if this Court grants certiorari, it would not address the constitutional issues. Accordingly, no important federal question is raised.

C. The Washington Supreme Court's decision, instead of conflicting with relevant decisions of this Court, follows them.

The Washington Supreme Court's decision correctly followed relevant decisions of this Court. If, indeed, § 409 is interpreted to preclude the use in state courts of state gathered information regarding traffic accidents that would have been gathered regardless of § 152, then such an interpretation would lead to the conclusion that § 409 violated the Tenth Amendment. Such a ruling would be in accord with the recent decisions by this Court addressing state sovereignty.

"The Constitution creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552, 115 S. Ct. 1624, 131 L. Ed. 2d 616 (1995). The Tenth Amendment embodies this core principle:

> the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs [this Court] to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power.

New York v. United States, 505 U.S. 144, 157, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992).

This Court has not hesitated to invalidate federal acts that intrude on state sovereignty. *See, e.g., United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) (invalidating civil remedy provision of Violence Against Women Act as exceeding commerce power); *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d

636 (1999) (holding Congress could not subject state to suit in state court under Fair Labor Standards Act without its consent); *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997) (holding that Freedom Restoration Act exceeded Congress' Fourteenth Amendment enforcement powers); *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 128 L. Ed. 2d 914 (1997) (holding that Congress could not require state officers to conduct background checks on prospective handgun purchasers under Brady Handgun Violence Prevention Act); *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) (holding that Congress lacked authority under Indian Commerce Clause to abrogate states' Eleventh Amendment immunity); *United States v. Lopez*, 514 U.S. at 549 (holding that Gun-Free School Zones Act exceeded Congress' power).

As an initial matter, the Washington Supreme Court held private citizens have standing to seek redress under the Tenth Amendment. As this Court has stated,

> [t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of *individuals*. State sovereignty is not just an end in itself. "Rather, federalism secures to *citizens* the liberties that derive from the diffusion of sovereign power."

New York v. United States, 505 U.S. at 181 (emphasis added) *quoting Coleman v. Thompson*, 502 U.S. 722, 759 (1991) (Blackmun, J., dissenting). This ruling is supported by numerous decisions. *See, e.g., Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1033, n. 6 (11th Cir. 1992); *Atlanta Gas Light Co. v. United States Dep't of Energy*, 666 F.2d 1359, 1369 n.16 (11th Cir. 1982); *Steward Machine Co. v. Davis*, 301 U.S. 548, 573, 57 S. Ct. 883, 81 L. Ed. 1279 (1937); *see also Dillard v. Baldwin County Commissioners*, 225 F.3d 1271, 1276-77 (11th Cir. 2000) (holding that, as long as a private plaintiff "suffered an injury in fact caused by the challenged action," he or she has standing to assert a Tenth Amendment claim); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 703-04 (7th Cir. 1999) (relying on *New York v. United States* in holding that private plaintiff suffering a concrete injury traceable to congressional action had standing to assert a Tenth Amendment claim).

The Washington Supreme Court, following precedent of this Court, held the 1995 amendment of § 409 violated the Tenth Amendment. It further held the respondents have standing to raise these issues under the Tenth Amendment.

If Congress violated the Tenth Amendment, then Guillen, as the party suffering an injury, has standing to seek redress.

1. Neither the Supremacy Clause nor the Necessary and Proper Clause are independent bases of constitutional authority.

Pierce County argues the Washington Supreme Court disregarded both the Supremacy Clause and the Necessary and Proper Clause. It fails, however, to understand that neither provision is an independent basis of constitutional authority.

First, "the Supremacy Clause enshrines as 'the supreme Law of the Land' only those federal Acts that accord with the constitutional design. Appeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power." *Alden v. Maine*, 527 U.S. at 731 (citation omitted). Pierce County must establish a basis for its Supremacy Clause argument by showing some independent constitutional power properly authorized by Congress. As discussed below, it cannot.

Second, the Necessary and Proper Clause, "the last, best hope of those who defend ultra vires congressional action," *Printz*, 521 U.S. at 923, likewise presents no independent basis of constitutional authority. "When a 'La[w] . . . for carrying into Execution' " an enumerated power "violates the principle of state sovereignty reflected in the various" enumerated powers "it is not a 'La[w] . . . *proper* for carrying into Execution' " an enumerated power "and is thus, in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.' " *Id.* at 923-24 (citations omitted, alterations in original). Again, Pierce County must establish a basis for its Necessary and Proper Clause argument

by showing some independent constitutional power properly authorized by Congress. It cannot.

2. The federal government does not have an interest in prohibiting the use of state gathered information under state law in state courts in carrying out the purpose of § 152 and thus did not have authority under the Spending Clause to effect such a result.

Under the Spending Clause, Congress has broad authority to provide for the general welfare. *See South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987). This Court has recognized that Congress may employ its power to further policy objectives by conditioning receipt of federal moneys on compliance by the recipient with federal statutory and administrative directives. *Id.* Notwithstanding these broad powers, Congress violates the Constitution if its conditions are not relevant and reasonably related to a valid federal interest in a specific national project or program. *Id.* at 207-08.

Pierce County has not explained what federal interest would be served if any court were to adopt its reasoning. There is no dispute that the federal government has an interest in safe roads. There is no dispute that the federal government can impose valid conditions upon its grant of funds to states for road improvements. There is no dispute that states, albeit in a short-sighted manner, may be of the opinion that they would rather forego federal funds for road improvements if data they gathered for no other reason than to determine which roads needed improving were discoverable for tort litigation. That

information is protected by the Washington Supreme Court's decision. However, there should also be no dispute that the discovery of traffic accident information that the state has historically kept and which its own laws require it to keep regardless of § 152 opportunities, has no effect whatsoever upon the state seeking federal funds. In other words, keeping from the jury the fact that the state compiled and collected accident information regarding a certain intersection for purposes of seeking federal funds is appropriate. It is appropriate because if a party in a tort action is allowed to admit into evidence that the state was gathering information about a certain intersection then a jury could reach an inference that the state admitted that the intersection was dangerous. This was the danger in which the federal government has an interest. However, the federal government does not have an interest in keeping a tort plaintiff from using raw data about a traffic intersection that is kept as a matter of course under state law. There, the discovery and use of that information will not have an impact upon a state's decision to seek federal funding.

The Washington Supreme Court interpreted § 409 to reach data that would have no bearing on a state's decision to seek § 152 funds. Under that statutory construction, it was correct in ruling that the federal government did not have authority under the spending clause to enact such a condition.

3. The challenged provisions are not an integral part of the regulatory program and thus Congress did not have authority under the Commerce Clause to prohibit raw traffic data from being introduced into evidence in state court proceedings.

Under the Commerce Clause, Congress may regulate three categories of activity: channels of interstate commerce, instrumentalities of interstate commerce, and activities that "substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59. Regardless of the activity regulated, where a "complex regulatory program" contains multiple components, a challenged component must be "an integral part of the . . . program" to survive Commerce Clause scrutiny. *Hodel v. Indiana*, 452 U.S. 314, 329 n.17, 101 S. Ct. 2376, 69 L. Ed. 2d 40 (1981).

Here, as discussed above, if § 409 prohibits the discovery and admissibility of raw traffic and accident data that would have been collected and compiled by the state regardless of federal funding opportunities, then such a provision would not be an integral part of the purpose of § 152. The Washington Supreme Court was correct in its holding:

> However, we fail to see how those vital federal purposes are reasonably served by also barring the discovery and admissibility in state court of routinely prepared state and local traffic and accident materials and data that would exist even had a federal safety enhancement program never been created, such as collision photographs, traffic counts, citizen complaint letters, and "raw data" relating to the history of a local traffic intersection. Such a broad privilege lacks the requisite nexus to § 409's raison d'etre and cannot be reasonably characterized as an "integral part" of the Federal-aid highway system's regulation.

Pet., App. A at 106.

4. If Congress had intended the scope of § 409 to be as broad as Pierce County is urging, then it could not be authorized under the Necessary and Proper Clause.

As noted above, if § 409 is given the expansive reach Pierce County is urging, then such a reach is neither necessary nor reasonable to effect the purposes of federal funding for highway safety. *See Printz*, 521 U.S. at 898.

Because an expansive reading of the 1995 amendment to § 409 cannot be justified under the Spending, Commerce, or Necessary and Proper Clauses of the Constitution, the Washington Supreme Court was correct in its ruling that the amendment violated the Tenth Amendment.

CONCLUSION

This Court lacks jurisdiction to hear this dispute at this time. Pierce County made the decision to seek interlocutory appeal from the trial court's decision instead of allowing the matter to proceed in the regular course. It did so despite the fact that all of its rights would have been preserved had it allowed the appeal to follow its normal course. It failed to do so.

Even if this Court has jurisdiction it should not accept certiorari because of the inherent problems with hearing an interlocutory appeal.

Finally, even if this Court decides that the interlocutory nature of this appeal does not preclude it from hearing the matter, Pierce County has failed to demonstrate a compelling reason for this Court accepting certiorari. It has not demonstrated that the Washington Supreme Court's opinion conflicts with any other state supreme court's ruling on the constitutionality of the 1995 amendment. It has not demonstrated that the Washington Supreme Court has decided an important federal question. And it has not demonstrated that the Washington Supreme Court has failed to follow relevant decisions of this Court.

Perhaps most importantly, Pierce County has not articulated how the Washington Supreme Court's decision has in any way compromised the goals of § 409. Pierce County has identified those goals as the following. First, not giving private plaintiffs an added advantage in their efforts to prove negligent government design or maintenance of certain traffic sites. Petition at 18. Second, prohibiting federally required record-keeping from being used as a tool in private litigation. Petition at 19. Here, those goals are still being accomplished. The Washington Supreme Court had a very narrow holding: it upheld the validity of § 409 except to the extent that it precluded a plaintiff from seeking raw data that the state would be keeping regardless of whether federal funding opportunities existed. This decision is consistent with other jurisdictions and consistent with sound public policy.

For these reasons, this Court should deny Pierce County's petition.

Respectfully submitted,

SALVADOR A. MUNGIA
WSBA #14807
Counsel of Record
DARRELL L. COCHRAN
WSBA #22851
J. BRADLEY BUCKHALTER
WSBA #29295
1201 Pacific Avenue
Suite 2200
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500

Counsel for Respondents